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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of	)	
	)	
Implementation of Infrastructure	)	CC Docket No. 96-237
Sharing Provisions in the	)	
Telecommunications Act of 1996	)	

COMMENTS OF
SOUTHWESTERN BELL TELEPHONE COMPANY

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December 20, 1996

No. of Copies rec'd 0+12
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SUMMARY*

Section 259 supplements the goal of preserving and advancing universal service by explicitly permitting mutually beneficial arrangements between non-competitors without the fear that third party obligations will be created. In this proceeding, the Commission should establish only broad guidelines that let parties freely negotiate such arrangements without regulatory intrusion.

Economies of scale and scope are not absolute measures, but exist to varying degrees for all carriers. Any carrier could thus conceivably meet the definition of "qualifying carrier" depending upon the particular infrastructure, the service area, and the particular use of the infrastructure associated with a particular request.

The intention of Section 259 is to promote universal service objectives. Attempting to list infrastructure available for sharing would be both counterproductive and fruitless. Infrastructure sharing should instead be a matter of negotiation. By the statutory language, "services" are not available for sharing.

The Commission cannot mandate access to intellectual property used by an incumbent LEC in contravention of the rights of its holder, both contractually and legally created. Only the owner of the property can authorize any such access. Incumbent LECs typically only have licenses that grant a limited right to use intellectual property subject to stated terms and conditions. Nothing in Section 259 overrides those licenses and other agreements, and the proposal of mandated access could create a multiplicity of contractual, and direct and

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* The abbreviations used in this Summary are as defined in the main text.

contributory infringement claims against the sharing LEC and qualifying carrier.

The inclusion of "public switched network . . . information" does not encompass any of a sharing LEC's proprietary business information, including marketing or customer information.

To avoid violating Section 259(b)(1), any infrastructure sharing must, at the very least, result in (1) an increase in economic welfare by using fewer total resources than would be required for both firms to separately provision the infrastructure; and (2) the sharing LEC being fully compensated for all relevant costs incurred in connection with the infrastructure sharing and not being financially harmed by the sharing requirement. All relevant costs should be considered, including a reasonable return to capital and risk premium, and the opportunity costs of engaging in infrastructure sharing, if any. Particular requests may also raise other "public interest" issues which cannot be foreclosed from consideration.

Infrastructure sharing is not common carriage by definition and by express limitation. The Commission should not adopt any non-discrimination requirement in violation of Section 259.

Only broad guidelines are at best needed for the "fully benefit" requirement. Promulgating specific rules, pricing methodologies, or proxies is not necessary and would restrict the ability of parties to negotiate mutually beneficial arrangements for specific and unforeseeable requests that may be made under Section 259.

The Commission should not issue rules with respect to network disclosure, but should rely upon the parties to negotiate disclosure arrangements. Those disclosure arrangements will necessarily depend upon the infrastructure being shared.

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Southwestern Bell Telephone Company ("SWBT") files these Comments in response to the Notice of Proposed Rulemaking, FCC 96-456, released November 22, 1996 ("NPRM"), by the Commission. This proceeding has been instituted to comply with the statutory obligation to promulgate rules implementing Section 259 of the Telecommunications Act of 1996 ("Act")[1] by February 8, 1997. Section 259 should be read in its context -- as a provision that supplements the goal of preserving and advancing universal service by explicitly permitting mutually beneficial arrangements between non-competitors without the fear that third party obligations will be created.

SWBT supports the Commission's tentative conclusions in paragraph 25 of the NPRM that detailed rules are not necessary to implement Section 259, and that general guidelines will be sufficient to minimize and resolve any disputes. In paragraph 7, the Commission suggests that infrastructure sharing agreements are to be a matter of negotiation between non-competing

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[1] Pub. L. No. 104-104; 110 State. 56 (1996).

"qualifying carriers" and incumbent local exchange carriers ("LECs"). Past experience has demonstrated the successful negotiation of many beneficial agreements on many subjects between non-competing incumbent LECs. Infrastructure sharing agreements should likewise be the product of freely negotiated agreements between the involved parties, and the negotiation process should be permitted to continue without the unwarranted intervention of an intrusive regulatory process through detailed rules and procedures.

Even though many questions are raised by the NPRM, SWBT will focus on the issues that are particularly critical to it.

I. INFRASTRUCTURE SHARING IS NOT LIMITED TO SMALL CARRIERS, BUT IS BASED UPON A RELATIVE MEASURE

In the NPRM, the Commission asks if the Congressional intent in Section 259 is to benefit the small telephone carriers. A major goal of the Act is to encourage and facilitate broad consumer access to evolving, advanced telecommunications services. The infrastructure sharing concept supports this goal, without penalizing a customer due to the size of his or her serving carrier. The Act defines a qualifying carrier as an eligible carrier (Section 259(d)(2)) that "lacks economies of scale or scope." Section 259(d)(1). Thus, insofar as small carriers may meet the requirements to be a "qualifying carrier," those carriers and their customers could benefit from the ability to share infrastructure with an incumbent LEC ("sharing LEC").

The Commission also seeks comment on whether there are classes of carriers that would *per se* qualify as lacking economies of scale or scope, such as the rural telephone companies. Congress did not specify that Section 259 would apply categorically to only one class of carriers and the Commission should not impose such a rule.

Any eligible carrier, regardless of size, could conceivably lack economies of scale or scope for particular infrastructure in a specific service area relative to another carrier. Economies of scale and scope are not absolute measures, but rather are relative conditions that likely exist to varying degrees for all LECS. The relevant inquiry for Section 259 purposes is instead how to determine when a carrier meeting the Section 259(d)(2) criteria also does not experience economies of scale and scope to any significant extent as compared to an incumbent LEC from which it could obtain infrastructure. Such a determination must be made on a case-by-case basis and requires an analysis of both firms' costs over a relevant range of possible output levels.

If this data is not reasonably available, a business case analysis of the infrastructure addition could be used to show whether a carrier qualifies for sharing under Section 259(d)(1). Such an analysis would consider the cost of the investment that the requesting carrier would incur to acquire the infrastructure on its own, relative to the costs of the potential sharing LEC. In assessing its costs, all relevant costs of the sharing LEC would be considered, including a reasonable return to capital and risk premium, and the opportunity cost of engaging in infrastructure sharing, if any.

II. THE COMMISSION SHOULD NOT ATTEMPT TO SPECIFY WHAT PUBLIC SWITCHED NETWORK INFRASTRUCTURE IS REQUIRED OR AVAILABLE FOR SHARING

In paragraphs 9-14, the Commission seeks comment on what should be included in the terms "public switched network infrastructure, technology, information, and telecommunications facilities and functions" for purposes of implementing Section 259(a). It specifically asks whether access to rights-of-way, resale, interconnection and unbundled network elements should be included under Section 259. The Commission also seeks comment on what implications the definitions of these terms have on the overall scope of Section 259 and how it relates to other sections of the Act, specifically to Section 251.

As an initial matter, the Commission should recognize that Sections 251 and 259 serve entirely different goals. Unlike Section 251, Section 259 was not intended to promote competition but rather to promote universal service objectives. As such, the Commission should follow its conclusion that infrastructure sharing arrangements should be largely the product of negotiations among parties. It need not be concerned with detailed lists and definitions of the types of public switched network infrastructure, technology, facilities and functions that could be part of a Section 259 arrangement; this should be left to negotiations. If, for example, a qualifying carrier wants to share infrastructure otherwise available under Section 251, the parties should not be foreclosed by Commission rule from negotiating a Section 259 arrangement.

Moreover, attempting to establish an infrastructure list could never be exhaustive because one cannot anticipate all potential sharing arrangements that might be requested and agreed to. In addition, prescribed lists or specifications would not allow for the desirable flexibility in an environment of continually evolving technology. The Commission should refrain from adopting definitions for the terms listed in the Act because any such list would be limiting to the concept of infrastructure sharing.

Finally, the Commission suggests at one point the notion of making services available for resale as part of infrastructure sharing. NPRM, para. 13. Section 259(a) sets forth a litany of what an incumbent LEC may need to share without any mention of "services." If Congress had contemplated "services" for infrastructure sharing, it would have mentioned them in Section 259(a). Instead, only "public switched network infrastructure, technology, information, and telecommunications facilities and functions" are available to enable qualifying carriers to provide telecommunications services. The Act simply does not require that incumbent LECS make available their own services as part of infrastructure sharing.

III. THE COMMISSION CANNOT MANDATE ACCESS TO INTELLECTUAL PROPERTY IN CONTRAVENTION OF THOSE PROPERTY RIGHTS

Within the scope of sharing "public switched network infrastructure, technology, information, and telecommunications facilities and functions," the Commission has proposed in paragraph 15 of the NPRM mandatory licensing of patents, subject to a reasonable license fee. SWBT opposes any mandatory licensing of intellectual property, whether a patent or any other form of intellectual property that is protected by federal or State law (e.g., copyright, trade secrets), to which the owner may legitimately claim compensation for its disclosure and use.

As an initial matter, the sharing of any intellectual property must be conditioned upon the qualifying carrier obtaining a sufficient license from parties that have a protectible interest in such property. As has been raised in relation to CC Docket No. 96-98 and its appeal, an incumbent LEC may use facilities, software, information, and other infrastructure that the LEC does not own but has licensed from third parties, either expressly or by implication. Vendors of equipment, software, and facilities used in LEC networks are likely to have intellectual property rights in those items. The vendors may have patents on the equipment, patents on the methods of performing the functions of the equipment or systems that they sell or install, copyrights on the software and on some technical information and trade secret rights in the software code and in the technical information. Increasingly over recent years, developers of software have been awarded patents on the methods with which that software performs certain functions. The patent claims generally describe processes that extend beyond the equipment housing the software. As a general rule, the equipment housing the software is sold outright (although any patents associated with the equipment would be retained by the vendor), the software is licensed as a right to use, and the technical information licensed under a duty to maintain its confidentiality.

Indeed, incumbent LEC networks are built upon licenses to use intellectual properties which are obtained from vendors. For example, SWBT's network is partially built upon licenses to use patents, copyrights and technical information (e.g., trade secrets) obtained from AT&T and its affiliates, primarily Bell Labs and Western Electric. As a provision of divestiture, the Bell Operating Companies, including SWBT, were licensed for all patents, copyrights and technical information needed to provide for their core businesses. Those licenses were only, however, to use or to have products made or services performed for them using the licensed intellectual properties. All other rights remained with the AT&T group (except for some licenses and rights granted to Bellcore).

Licensing rights from all vendors have the same fundamental structure. Typically, any intellectual property is licensed for a fee or as part of the total cost of an integrated system (either explicitly or automatically), and a non-exclusive license is obtained which permits the right to use the intellectual property under stated terms and conditions. Pursuant to those licenses, an incumbent LEC is generally able to use and practice the intellectual property in its business. However, the incumbent LEC is unlikely to own those intellectual properties, or to have been granted the ability to license their use to a third party for its own use. An incumbent LEC may not even have the authority to disclose the vendor's proprietary technical information due to confidentiality requirements. For example, while the vendor's software code may be protected by patent and/or copyright, the technical documentation for the software or the equipment may be licensed as a trade secret subject to strict non-disclosure obligations.

The Commission cannot disregard legal rights associated with intellectual property, the limitations on those licenses, or require a sharing LEC to violate its lawful obligations or the rights of others through sharing infrastructure. There is nothing in Section 259 that even remotely indicates that the Commission has been authorized to override any party's intellectual property rights, or the binding legal obligations of incumbent LECS. For example, 35 U.S.C. Section 154 gives a holder of a patent exclusive rights to the patented invention. The owner can exclude others from making, using, importing, selling or offering the invention for sale without authority of the patent owner. The owner of a patent has no obligation to license the invention. E. Bement & Sons v. National Harrow Co., 186 U.S. 70 (1902); Cataphote Corporation v. DeSoto Chemical Coatings, Inc., 450 F.2d 769 (9th Cir. 1971), cert. den., 408 U.S. 929 (1972). Similarly, 17

U.S.C. Section 106 gives the holder of a copyrighted work exclusive rights to reproduce the work, prepare derivative works and distribute copies. Again, the owner is free to license or refrain from licensing. Stewart v. Abend, 495 U.S. 207 (1990).

The patent laws were enacted as an incentive to invent and to reveal the invention to spur additional developments. The monopoly given to the inventor is in furtherance of this purpose and serves the public good. See U.S. v. Masonite Corporation, 316 U.S. 265 (1942); Saf-gard Products, Inc. v. Service Parts, Inc., 532 F.2d 1266 (9th Cir. 1976), cert. den., 429 U.S. 896 (1976). Similarly, a copyright holder is given exclusive rights to encourage the creation of works of authorship in order to benefit the general public. See Mazer v. Stein, 347 U.S. 201 (1954); Fox Film Corp. v. Doyal, 286 U.S. 123 (1932). Congress created the monopolies in furtherance of strong and longstanding public policy objectives.

The Commission is without authority to abridge those rights absent clear statutory authority from Congress. As the Court stated in Cleveland Trust Co. v. Schriber-Schroth Co., 108 F.2d 109, 114 n.2 (6th Cir. 1939), rev'd on other grounds, 311 U.S. 211 (1940), "[m]onopoly is the essence of the inventor's reward . . . Its control, abridgement or destruction lies wholly within the legislative province." There is absolutely nothing in Section 259 or its legislative history that indicates that Congress authorized the abridgement of those intellectual property rights by mandatory licensing, whether the holder of the intellectual property is a third party or the sharing LEC. Such holders remain entitled to the benefits of their intellectual property, without fear of a taking at less than just compensation.

Requiring mandatory licensing in contravention of those rights and contractual obligations could also be expected to result in a multiplicity of third party claims. For example, the incumbent LEC might face breach of contract claims, and the qualifying carrier tortious interference claims. Both might also face infringement or contributory infringement claims from patent and/or copyrights holders. See, e.g., 35 U.S.C. Section 271(c); Gershwin Publishing Corp. v. Columbia Artists Management, Inc., 443 F.2d 1159 (2d Cir. 1971); CMAX/ Cleveland, Inc. V. UCR, Inc., 804 F.Supp. 337 (M.D.Ga. 1992).

For these reasons, the Commission should not require mandatory licensing of intellectual property by incumbent LECS. Only an owner of intellectual property may set the terms and conditions of a license to use such property, and qualifying carriers will need to negotiate with the owner.

IV. INFRASTRUCTURE SHARING DOES NOT ENCOMPASS CUSTOMER INFORMATION OR OTHER PROPRIETARY BUSINESS INFORMATION

The Commission raises the issue of whether proprietary business information falls within the sharing obligation of Section 259. NPRM, para. 16. The language of the statute clearly does not stretch that far. By its terms, Section 259 applies to "public switched network infrastructure, technology, information, and telecommunications facilities and functions." Contrary to the Commission's reading in paragraph 9, "public switched network" modifies each of the subsequent items. Accordingly, the operative phrase "public switched network information" should be read consistently with the purpose of Section 259, which was to make available telecommunications technology. To cite two examples, marketing and customer information would thus clearly fall outside the category of information which Section 259 envisions.

V. THE COMMISSION SHOULD ADOPT A CLEAR STANDARD FOR DETERMINING JURISDICTION OVER DISPUTES PERTAINING TO INFRASTRUCTURE SHARING

The Commission seeks comment on jurisdictional issues with regard to resolving Section 259 disputes. SWBT believes that jurisdiction must be determined on a dispute-by-dispute basis, with the location of sharing LEC, the infrastructure, and the interstate/intrastate jurisdiction of its use determining the proper forum for a specific dispute. For example, if an eligible carrier seeks to share an incumbent LEC's infrastructure located in Missouri, and will use the shared infrastructure to provide an intrastate service, jurisdiction should be in Missouri. On the other hand, if the infrastructure would be used to provide interstate service, the Commission would have jurisdiction over disputes. If the use were to be mixed, either the Commission or the Missouri Public Service Commission would be proper. For reasons of personal jurisdiction, fundamental fairness, and due process, in no event should an incumbent LEC be subjected to jurisdiction in any State in which it does not provide local exchange or exchange access service.

VI. THE COMMISSION SHOULD ADOPT A SIMPLE GUIDELINE FOR DETERMINING WHETHER A PROPOSED SHARING ARRANGEMENT IS NOT REQUIRED UNDER SECTION 259(B)(1)

Section 259(b)(1) of the Act establishes that an incumbent LEC cannot be required to engage in any action that is economically unreasonable or contrary to the public interest. To avoid violating these restrictions, any infrastructure sharing must, at the very least, result in (1) an increase in economic welfare by using fewer total resources than would be required for both firms to separately provision the infrastructure; and (2) the sharing LEC being fully compensated for all relevant costs incurred in connection with the infrastructure sharing and not being financially harmed by the sharing requirement. In assessing the cost of infrastructure sharing, the providing carrier should consider all relevant costs, including a reasonable return to capital and risk premium, and the opportunity costs of engaging in infrastructure sharing, if any.

Of course, as required by the statute, the Commission's regulations should not foreclose an incumbent LEC from objecting to a particular infrastructure sharing request due to public interest considerations. Given the unforeseeable nature of the various sharing requests that may be received, there may be legitimate public interest issues raised by a particular request which can only be judged on the specific facts and circumstances. The Commission cannot anticipate every possible permutation, and thus should not attempt to foreclose a public interest inquiry.

VII. INFRASTRUCTURE SHARING CANNOT BE TREATED AS COMMON CARRIAGE UNDER ANY CIRCUMSTANCES

At paragraph 22, the Commission questions the intent of the language in Section 259(b)(3) of the Act that the sharing local exchange carrier not be treated as a "common carrier for hire or as offering common carrier services with respect to any infrastructure, technology, information, facilities, or functions made available to a qualifying carrier in accordance with regulations issued pursuant to this section." The Commission nevertheless asks whether or not a providing LEC has an inherent non-discrimination obligation to the qualifying carrier and whether sharing arrangements are required to be made available to similarly situated qualifying carriers.

There is no such obligation. First, the prohibition against unreasonable discrimination is imposed upon common carriers in their provision of communications services.[2] Nowhere does Section 259 reference or indicate the provision of a communications or telecommunications service. Secondly, Congress expressly exempted infrastructure sharing arrangements from common carrier regulation. Therefore, none of the typical obligations of common carriage are applicable, including the filing of schedules of services, charges, practices, and the prohibition against unreasonable discrimination and preference. Just as the Commission should not impose pricing schedules, neither should it require that sharing LECS make infrastructure sharing arrangements available to similarly situated qualifying carriers on the same terms.

Specific requests for infrastructure sharing arrangements can be expected to vary substantially, because of the unique economic circumstances of the requesting carrier. If these arrangements are entered into as a result of good faith negotiations carried under "conditions that promote cooperation,"[3] there is no need for Commission concern over competitive neutrality among qualifying carriers.

VIII. THE COMMISSION SHOULD ISSUE ONLY BROAD GUIDELINES ON THE "FULLY BENEFIT" REQUIREMENT

Section 259(b)(4) requires that qualifying carriers "fully benefit" from the sharing LEC's economies of scale and scope. To meet this mandate requires that the qualifying carrier pay a price that just compensates the providing LEC for all relevant costs of the infrastructure sharing

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[2] 47 U.S.C. § 201(a).

[3] 47 U.S.C. § 259(b)(5).

arrangement.

Relevant costs consist of all additional costs the sharing LEC incurs, including variable costs and any arrangement-specific fixed costs that arise from infrastructure sharing. Relevant costs also include a reasonable return to capital, including a risk premium, to help recover the initial start-up costs of deploying the shared infrastructure. In fact, it is precisely because of the relatively high fixed start-up costs that Section 259 came into being. To deny the providing LEC the opportunity to recover these legitimate business costs from all users of that investment, including qualifying carriers, would be economically unreasonable; it would essentially give the qualifying carrier a "free ride" with regard to major costs associated with the infrastructure it seeks to use through sharing. Relevant costs also include the opportunity costs of engaging in infrastructure sharing, if any.

The Commission should at most adopt broad guidelines to frame the economic principles that should guide negotiating Section 259 arrangements. However, promulgating specific rules and guidelines, prescribing specific pricing methodologies, or establishing a set of prices, is not necessary and would severely restrict the parties' ability to freely negotiate mutually beneficial arrangements. Infrastructure sharing requests will often be for very specialized circumstances and arrangements, and a set of defined rules or rigid guidelines would not provide the necessary flexibility to tailor the terms and conditions to the request at hand. All that is needed is a general framework within which the parties should negotiate in good faith, and the Commission should establish only broad guidelines that establish such a framework.

IX. THERE IS NO NEED FOR THE COMMISSION TO MANDATE FURTHER NETWORK DISCLOSURE REQUIREMENTS

At paragraph 34, the Commission inquires as to the type of information that sharing LECS must provide to qualifying carriers. The Commission's concerns over the details of providing information are unwarranted. First, Section 259(c) directs the provision of timely information, not Section 259(b) which established the need for this rulemaking proceeding. Therefore, rules on disclosure under Section 259(b) are not statutorily required of the Commission.

Furthermore, if, as the Commission properly notes, Section 259 arrangements will "largely [be] the product of negotiations among parties" (NPRM, para. 7) and that "detailed national rules may not be necessary to promote cooperation" (NPRM, para. 25), then the parameters of providing information on planned deployments would seem to fall squarely within the negotiations of an infrastructure sharing agreement. Also, since the extent, timing, and other necessary factors for a proper sharing of information are dependent upon the nature of the infrastructure being shared, the details of that sharing must be left to determination by the agreeing parties. Any Commission rules would have to be so overly broad as to lend little benefit to the infrastructure sharing process.

X. CONCLUSION

As Congress envisioned, infrastructure sharing under Section 259 should be a matter of negotiation between incumbent LECS and qualifying carriers to the greatest extent possible. The Commission should avoid issuing anything but general guidelines on Section 259 in order to permit full and free negotiations between non-competitors.

Respectfully submitted,

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December 20, 1996

CERTIFICATE OF SERVICE

I, Kelly Brickey, hereby certify that the foregoing "Comments of Southwestern Bell Telephone Company.", has been served December 20, 1996, to the Parties of Record.

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